MOSCOW NARODNY BANK LTD.

v.

NEW KOK ANN REALTY SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[ORIGINATING SUMMONS NO. 116 OF 1982]
1 JUNE 1989

LAND LAW: *Form 16E - Discrepancy between body of charge and annexure - Notice of variation of interest rates - Provisions for repayment within one year and repayment of demand - Section 256 National Land Code 1965.*

The plaintiff granted a loan of RM3,000,000 to Mosbert Finance (Hong Kong) Limited (subsequently known as Mosbert Acceptance Limited and hereinafter referred to as "Mosbert") in five instalments between 8 September and 11 October 1972. Mosbert at the material time was the beneficial owner of 40% of the total issued share capital of the defendant. On 30 August 1972 the defendant passed a resolution charging 11 pieces of land to the plaintiff. A charge was executed on 11 January 1973 after an earlier charge granted over the said land in favour of Public Finance Bhd. had been discharged. Mosbert subsequently defaulted in the repayment of the said loan and was placed under liquidation. The plaintiff issued a demand in Form 16E which was not complied with. The plaintiff thereafter applied for an order of sale in relation to the said land pursuant to s. 256 of the National Land Code 1965. The body of the charge stated that the defendant had received the said loan, while the annexure to the charge and the evidence showed it had been paid to Mosbert. Clause 4 of the charge granted the plaintiff the discretion to vary the applicable rate of interest by serving notice on the defendant and, or Mosbert. No such notice was sent. Clause 1 of the charge provided for the repayment of the loan within one year, while Clause 2 provided for the repayment of the loan or demand. The defendant raised the following points in objection to the granting of such an order:

(1) whether the said pieces of land charged can be foreclosed to recover sums allegedly paid to Mosbert;

(2) whether the charge is void for a failure of consideration;

(3) whether the charge is void for past consideration if it covers loans given to Mosbert;

(4) whether the statutory notice in Form 16E was the correct one to have been used; and

(5) whether interest at the rates claimed is recoverable after 20 February 1976 or 24 May 1976 as the case may be.

Held:

[1] The burden of proving a "cause to the contrary" for the purposes of s. 256(3) of the National Land Code 1965 rests with the defendant.

[2] The annexure to the charge forms an integral part of the charge. From the annexure and the surrounding circumstances it was clear that the loan was granted by the plaintiff to Mosbert and that the defendant agreed to create the charge to secure the loan on 30 August 1972, when the said resolution was passed, before any part of the loan was released to Mosbert. Hence, the charge was not void for failure of consideration or that the consideration was past consideration.

[3] The provisions of Clause 1 and 2 of the charge were not contradictory but complementary. As it operated to allow repayment within one year subject to the plaintiff's overriding right to demand repayment at any time. Hence, it was in order for the plaintiff to have used Form 16E.

[4] There was no evidence that any interest had been improperly imposed by the plaintiff and when the notice of demand was given, Mosbert was already in liquidation. As such no purpose would have been served if a notice changing the rate of interest had been sent to either Mosbert or the defendant. In any event, the provisions of the charge providing that a statement of an officer of the plaintiff as to the amount of the balance owing would be final and conclusive would apply in the absence of fraud.

[5] As the total amount due to the plaintiff was not available at the date of the hearing, the matter would be adjourned to 5 June 1989 for the making of the appropriate order of sale.

Cases referred to:
Chai Yen v. Bank of America National Trust & Savings Association [1981] 2 MLJ 141
Co-operative Central Bank Ltd. v. G. Visvanathan s/o Govindasamy & 3 Ors. [1987] CLJ (Rep) 546
Eliathamby v. Sheikh Mohamed bin Said [1970] 2 MLJ 144
Jacob v. Oversea Chinese Banking Corp. [1974] 2 MLJ 161

Legislation referred to:
National Land Code 1965, ss. 255, 256(3), 257(1) Form 16E

For the plaintiff - G. Lakshmi (Edward Yong with her); M/s. S.M. Yong & Co
For the defendant - K.S. Narayanan; M/s. Ng Ek Toong & Partners

JUDGMENT

LC Vohrah J:

This is an application by way of originating summons on the part of the plaintiff under s. 256 of the National Land Code 1965 for 11 pieces of land belonging to the defendant and charged to the plaintiff to be sold for non-payment of a loan granted to a third party.

The facts briefly stated are as follows. The plaintiff granted a loan of RM3,000,000, the equivalent at the material time of US$1,125,000, to Mosbert Finance (Hong Kong) Limited known subsequently as Mosbert Acceptance Limited ("Mosbert"). As security for this loan the defendant charged the said pieces of land to the plaintiff. Mosbert defaulted in repaying the loan and eventually went into liquidation resulting in its affairs being taken over by the official receiver of Hong Kong. In consequence the plaintiff through its solicitors sent a statutory demand in Form 16E pursuant to s. 255 of the Code but no repayment was made. Hence the present application.

Section 256(3) of the Code provides that in an application such as the present one "the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary." I agree with counsel for the plaintiff that the burden is upon the defendant to show cause as to why an order for sale should not be made. From the contentions that have been raised in the affidavits, five issues have been identified by counsel for the defendant, with the agreement of counsel for the plaintiff, for the consideration of the Court. They are as follows:

1) whether the said pieces of land charged can be foreclosed to recover sums allegedly paid to Mosbert;

2) whether the charge is bad for a failure of consideration;

3) whether the charge is void for past consideration if it covers loans given to Mosbert; *a*

4) whether the statutory notice in Form 16E was the correct one to have been used; and

5) whether interest at the rates claimed is recoverable after 20 February 1976 or 24 May 1976 as the case may be.

As the first three issues are interconnected I shall proceed to deal with them together. I find the following facts undisputed in regard to the three issues. The loan was actually granted to Mosbert in five instalments in 1972 between 8 September and 11 October (See encl. 13, Exhibits 'Al-A5'). Mosbert at all material times was the beneficial owner of 40% of the total issued shares of the defendant. By a resolution passed on 30 August 1972 the defendant decided to charge the said pieces of land to the plaintiff (See encl. 29, Exhibits 'TCC2' and 'TCC3'). The charge was executed on 11 January 1973 in favour of the plaintiff after the said pieces of land which were charged to Public Finance Bhd. had been discharged. The demand for repayment in Form 16E was received by the defendant in May 1976 but no repayment was made. No objection was taken by the defendant to the charge until 16 September 1979 when the defendant filed a suit against the plaintiff in Johore Bahru civil suit 294 of 1979 praying for a declaration that the charge was void and enforceable but the suit was struck out for want of prosecution on 24 November 1986. The persons who were directors of the defendant at the time when the resolution was passed are no longer the directors of the defendant. *b* *c* *d*

Now to the facts in issue. The body of the charge reads:

> We, New Kok Ann Realty Sendirian Berhad, a company incorporated in Malaysia and having our registered office at 3rd Floor, UMNO Building, Jalan Segget, Johore Bahru, Johore (hereinafter called the Chargor(s) being proprietor(s) of the land (s) described in the schedule below (hereinafter called "the said land(s)"): *e*
>
> For the purpose of securing:
>
> a) the repayment to the chargee named below, with interest, of a loan of RM3,000,000 (Dollars Three Million (Malaysian) only the receipt of which we hereby acknowledge;
>
> Hereby charge the said land(s) with the payment to the said chargee of the said sum and interest thereon in accordance with the provisions annexed hereto. *f*

Counsel for the defendant contends that because the body of the charge states that the defendant had acknowledged receipt of the loan whereas the evidence clearly showed that Mosbert had received the total sum of RM3,000,000 the charge is bad for failure of consideration. Counsel for the plaintiff however points out that the body of the charge stipulates that the said lands were charged in accordance with the provisions of the annexure and they must be taken into account. The relevant provisions read as follows: *g*

> 1. The chargors and/or Mosbert Finance (Hong Kong) Limited will repay the said sum of Dollars Three Million (3,000,000) within one year from the date hereof and interest at the rate as mentioned (*sic*) in Clause 2 below.
>
> 1.(a) It is hereby agreed and declared that this charge and the charge of even date with these presents executed by Lim Eng Teck and the bank in respect of the lands therein-mentioned are instruments employed in one transaction to secure the principal sum of Malaysian Dollars Three Million (RM3,000,000) only with interest thereon within the meaning of s. 4(3) of the Stamp Ordinance 1949 and for the purpose of the said s. 4(3) this charge is deemed to be the principal instrument. *h*
>
> ... *i*
>
> is/are included in and form(s) part of the aforesaid charge.

2. **The chargor(s) will on demand pay to the bank all sums of money which are now or shall from time to time or at any time hereafter be due or owing by the chargor(s) and/or Mosbert Finance (Hong Kong) Limited...hereinafter called "the borrower(s)** solely or jointly with any other persons, firms or companies and whether as principal or surety or which the chargor(s)/borrower(s) may be or become liable to the bank anywhere on banking account or any other accounts current or otherwise or in any manner whatsoever including the balance for the time being owing for or in respect of cheques, bills, notes, drafts or other negotiable instruments accepted, paid or discounted for an on behalf of the chargor(s)/borrower(s) either alone or jointly with another or others or for any other payments, loans, credits or advances made to or for the use or accommodation or on behalf of the chargor(s)/borrower(s) whether alone or jointly with another or others pursuant to or in respect of or under any guarantee or letter of credit given, established or opened by the bank for the chargor(s)/ borrower(s) or any contracts for the forward delivery of goods bills or specie or in respect of any other banking facilities whatsoever whether or not given upon or under any trust receipts or other security whatsoever or otherwise howsoever up to an aggregate sum of Dollars Three Million (RM3,000,000) only for principal... together with interest thereon at the rate of eight and a half per centum (8½%) per annum or at such other rate or rates as may be imposed by the bank from time to time with monthly rests (hereinafter referred to as the "prescribed rate "which expression shall wherever the context so permits include any and such other rate which the bank at any time and from time to time may stipulate in the manner hereinafter appearing) commission discount and all other banking charges and all costs charges and other expenses which the bank charge in respect of any of the matters aforesaid or which the bank may pay or incur in registering this charge or in perfecting the present security or in enforcing or obtaining payment of such moneys or in paying any expenses or outgoings whatsoever in respect of or in insuring repairing, maintaining, managing or realising the Said land and or any buildings, fixtures, crops or plants thereon or in defending, prosecuting or otherwise howsoever taking part in or attending at (whether on a watching brief as observer or otherwise howsoever) any action enquiry hearing suit or other proceedings whatsoever affecting the said land or any buildings, fixtures, crops or plants and also all other payment and sums hereinafter mentioned or stipulated and other usual bankers' charges.

And if when the said account or accounts current or otherwise shall be closed either by demands as aforesaid or by the death of chargor(s) (or where the chargor(s) shall be more than one person by the death of any one of them) a balance shall be owing to the bank by the chargor(s)/borrower(s) the chargor(s) or the personal representatives of the chargor(s) as the case may be will so long as the same or any part thereof shall remain owing pay to the bank interest thereon at the prescribed rate with monthly rests computed from the time when such balance shall have been ascertained and the **chargor(s) agree(s) that the statement of the manager, assistant manager, sub-manager, accountant or any other officer of the bank as to the amount of such balance shall be final and conclusive.** (emphasis added).

In my view the annexure to the charge forms an integral part of the charge. I find support for this view in the statement of Abdoolcader J (as he then was) in *Chai Yen v. Bank of America National Trust & Saving Association* [1981] 2 MLJ 141 at p. 143:

> The fact that it (the annexure) is not signed by the parties does not affect its validity or that of the charge as the charge itself effected by an instrument in Form 16A prescribed under s. 242 of the Code expressly provides for the charge to be in accordance with the provisions annexed thereto. There is no mandatory requirement in the Code for the execution of the annexure to a charge and in any event on an application of the maxim '*verba relata hoc maxime*

> *operantur per referentiam ut in eis inesse videntur*' (words to which reference is made in an instrument have the same operation as if they were inserted in the clause referring to them), it must be considered to be the same thing as if the terms of the annexure referred to in the charge had been actually inserted in the charge itself 'since it was, by operation of this principle' incorporated with it *Llewellyn v. Earl of Jersey* (at p. 246) *Lyle v. Richards' Barton v. Dawes* (at pp. 263' 266)).

Further in the words of Edgar Joseph Jr. J in *Co-operative Central Bank Limited v. G. Visvanathan s/o Govindasamy & 3 Ors.* [1987] CLJ (Rep) 546 (at p. 550):

> As in the case of guarantees or indeed any other contract, the charge must be construed reasonably having regard to the surrounding circumstances.

From the provisions of the annexure and the surrounding circumstances it is clear that the defendant agreed to create the charge in order to secure the loan that was to be granted to Mosbert by the plaintiff. It is also clear that the defendant must have executed the charge on 11 January 1973 pursuant to the directors' resolution passed on 30 August 1972 to charge the said lands to the plaintiff to secure the loan in favour of Mosbert (See encl. 29, Exh. 'TCC2'). The delay in the execution of the charge was explained by the undisputed fact that the said pieces of land at the material time were still charged to Public Finance and had to be discharged before they could be recharged to the plaintiff. It is obvious therefore that although the five instalments of the loan granted to Mosbert before the charge was formally executed on 11 January 1973 and registered on 10 April 1973 the charge was in fact agreed to be created for the specific purpose of securing the loan for the benefit of Mosbert, the principal debtor before any part of the loan was released. I am accordingly of the view that the charge is not void merely because the sums were actually paid to Mosbert although the charge itself described the receipt of the loan sum to have been acknowledged by the defendant. I cannot see how there has been a failure of consideration or that the consideration was past consideration.

The next question I have to consider is whether the correct statutory form had been used. Counsel for the defendant contends that on the authority of *Eliathamby v. Sheikh Mohamed Bin Said* [1970] 2 MLJ 194 that the statutory notice of demand sent by the plaintiff in Form 16E was incorrect and that consequently the application for the foreclosure order should be dismissed. In my view although Clause 1 provided for the repayment of the loan within one year, that fact alone did not make the facility a term loan as such. When that period elapsed the plaintiff was entitled to avail itself of Clause 2 which imposed an obligation on the defendant to pay the plaintiff on demand. I agree with the submission of Counsel for the plaintiff that the two clauses do not contradict but complement each other. They operated to allow repayment within one year subject to the bank's overriding right to demand repayment at any time. Accordingly I am of the view that it was in order for the plaintiff to have used Form 16E in this case: See *Jacob v. Oversea-Chinese Banking Corp.* [1974] 2 MLJ 161.

I come now to the last issue for consideration. Clause 2 provided for interest to be paid on the principal 'at the rate of eight and a half per centum (8½%) per annum or at such other rate or rates as may be imposed by the bank from time to time with monthly rests' and Clause 4 provided that "the bank shall be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the chargor(s) and/or the borrower(s) such of its intention and such amended rate of interest shall be payable as from the date specified in the notice." As it was admitted by the plaintiff's senior credit officer Tan Chee Cheong in cross-examination that no notice was sent either to the defendant

or Mosbert, Counsel for the defendant stated that any interest leviable could not exceed 8½% per annum. There has been no evidence or allegation that any interest had been improperly imposed by the plaintiff and it is also not disputed that at the time when the notice of demand dated 20 February 1976 was given (See encl. 2, Exh. P2) Mosbert was already in liquidation and its affairs were managed by the Official Receiver of Hong Kong so that no purpose would have been served if the notice of variation had been sent either to the Mosbert or the defendant. In any event, I am of the view that in the absence of fraud by virtue of Clause 2 "the statement of the manager, assistant manager, sub manager, accountant or any other officer of the bank as to the amount of such balance shall be final and conclusive". I agree with Counsel for the plaintiff that the defendant cannot now argue that the amount stated by the plaintiff as being due is not correct.

As the total amount due to the plaintiff is not available today I would adjourn the matter to 5 June 1989 for the making of the appropriate order for sale under s. 257(1).

Also found at [1989] 2 CLJ 851